

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EASTERN TIER CARRIER CORPORATION	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Tax under Article 9	:	
of the Tax Law for the Years 1984 through 1987.	:	

Petitioner, Eastern Tier Carrier Corporation, 250 State Highway, Secaucus, New Jersey 07044, filed a petition for redetermination of a deficiency or for refund of corporation tax under Article 9 of the Tax Law for the years 1984 through 1987 (File No. 806466).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 24, 1990 at 10:45 A.M., with additional information to be submitted by March 15, 1990. Petitioner appeared by Tenzer, Greenblatt, Fallon & Kaplan (Sidney Mandel, Esq., and Glenn A. Busch, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether the Tax Appeals Tribunal may grant petitioner a conciliation conference to challenge nine notices of deficiency, where petitioner failed to file a petition within 90 days of the issuance of those notices.

FINDINGS OF FACT

Petitioner, Eastern Tier Carrier Corporation, is a New Jersey corporation. The Division of Taxation conducted a truck mileage tax, a fuel use tax and a corporation tax audit of petitioner's business operations for the years 1984 through 1987. As a result of this audit, the Division, on May 27, 1988, issued nine notices of deficiency to petitioner. On the face of each notice was the following statement: "A deficiency, as detailed on statement of audit adjustment attached or previously sent you, has been determined". An assessment number was stated on the face of each notice. They were numbers: C880527903F, C880527904F, C880527905F, C880527906F, C880527907F, C880527908F, C880527909S, C880527910S and C880527911S. The following statement was printed on the reverse side of each notice:

"If you do not return the signed consent, the deficiency will become an assessment subject to collection, with interest to date of payment, unless you file a petition according to Section 1089 of the Tax Law and the Rules of Practice before the State Tax Commission, within 90 days after the date of this notice".

The nine notices of deficiency were mailed to petitioner by certified

mail (number 26627) on May 27, 1988.¹ By letter dated and sent by Federal Express September 9, 1988, some 105 days from May 27, petitioner asked the Division to schedule a conciliation conference. The Division issued a Conciliation Order, dated September 30, 1988, denying petitioner's request for a conference on the ground that the request for conference was not received within 90 days of the issuance of the notices of deficiency.

The notices of deficiency were preceded by other written communications between the parties.

(a) On or about January 29, 1988, the Division sent petitioner a form entitled "Consent to Field Audit Adjustment". The consent was accompanied by a cover letter which stated, in pertinent part:

"If you disagree with the findings, you may, within 30 days submit written evidence or information to substantiate your disagreement to the above address or you may request a conference at the District Office Audit Bureau in New York City. If you wish to be represented by an attorney, or agent, you must file a power of attorney. If no protest is filed, or if no agreement is reached by correspondence or conference, a statutory notice of deficiency will be issued which will become a statutory assessment unless petition is filed with the State Tax Commission within 90 days" [sic].

(b) In response to this letter, petitioner sent a letter dated February 22, 1988, notifying the Division that it disagreed with the audit findings, requesting a conference to discuss those findings, and asking for power of attorney forms. Petitioner received no reply from the Division; therefore, a second letter was sent, dated May 10, 1988, repeating the statements made in the earlier letter.

(c) A letter signed by Jim Hika, Tax Auditor II, was sent to petitioner in response to its letter of May 10. The date of reply is not known since the copy of the Division's letter placed in evidence bears no date. The letter states: "Please be advised that a conference will be scheduled before the Bureau of Mediation & Conciliation subsequent to the

receipt of a letter of protest to the Formal Billing which will be issued shortly."

(d) The Division issued to petitioner nine statements of audit adjustment dated May 27, 1988. The assessment numbers on these statements correspond to the assessment numbers on the notices of deficiency. Petitioner conceded that these statement were received on May 29, 1988. Each statement included the following warning: "Important: Your failure to respond to this letter within 30 days will result in the issuance of a statutory Notice of Deficiency for the amount of this additional tax plus accrued interest. The issuance of this Notice represents the first formal step toward taking legal action to compel payment." The notices of deficiency referred to in the statement were issued contemporaneously with the statements of audit adjustment, rather than 30 days later.

(e) On July 20, 1988, petitioner received two assessments of unpaid truck mileage tax and fuel use tax.

¹In a letter addressed to "Mr. Skorenski, Bureau of Conciliation and Mediation Services", petitioner's representative alleged that the notices were not mailed until July 15, 1988 and were not received until July 18, 1988. However, by its petition, petitioner conceded that the notices were received on June 1, 1988.

Petitioner's president, Marvin H. Weiner, was confused by the various statements contained in the documents issued by the Division. He believed that the Division's response to his May 10th letter guaranteed him a conciliation conference before the corporation tax deficiencies became fixed and final.

CONCLUSIONS OF LAW

A. Petitioner seeks a conciliation conference to address the underlying merits of its case. Petitioner's representative made two arguments in support of its request for a conference. First, he contended that petitioner actually had 120 days from May 27 to request such a conference. Second, he maintained that it was arbitrary and capricious to deny petitioner a conciliation conference, since the Division's documents had led petitioner to believe that such a conference would be granted.

B. Instructions on the statements of audit adjustment indicate that, if a statement is not challenged, it will be followed in 30 days by a notice of deficiency. In fact, the notices of deficiency were issued on or about the same date as the statements. Petitioner argues that the notices of deficiency were issued prematurely; that is, if the procedure indicated on the statements had been followed, petitioner would have had 120 days from the issuance of the statements of audit adjustment to protest the notices of deficiency. Since a request for conference was filed within this 120-day period, petitioner contends that a conference should have been granted.

Section 1089(b) of the Tax Law, in effect on the date the notices of deficiency were issued, provides that within 90 days "after the mailing of the notice of deficiency authorized by section one thousand eighty-one, the taxpayer may file a petition with the tax commission for a redetermination of the deficiency." Tax Law § 1081(b) provides:

"After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice..., except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section one thousand eighty-nine."

In short, the notices of deficiency became unchallengeable assessments 90 days from May 27, 1988, or on August 25, 1988. There is no statutory provision for the issuance of a statement of audit adjustment, hence no authority allowing for extension of the 90-day period for filing a petition on the basis of such a statement.

C. Petitioner's representatives may well have been confused by the various documents issued by the Division. Moreover, it is apparent that Mr. Weiner sought an informal conference to discuss the audit findings, as he was instructed to do by the Division's letter of January 29, 1988, and such a conference was not granted. Mr. Hika's letter is not a model of clarity, and it is conceivable that Mr. Weiner believed on the basis of that letter that he had secured the right to a meeting with the Division before the tax deficiencies became fixed. However, petitioner was also advised that the notices of deficiency would become final assessments unless a petition was filed within 90 days of the mailing of the notices. If Mr. Weiner was confused by the seemingly contradictory statements he was receiving, it was his duty to seek clarification (see, Matter of Dynamic Telephone Answering Systems v. State Tax Commission, 135 AD2d 978, 522 NYS2d 386, lv denied 71 NY2d 801). In accordance with Tax Law § 1081(b), the notices of deficiency issued to petitioner became final assessments 90 days after they were mailed. The Tax Appeals Tribunal does not have the authority to waive the statutory provision and grant petitioner the relief it seeks.

D. The petition of Eastern Tier Carrier Corporation is denied in all respects.

DATED: Troy, New York
April 12, 1990

/s/ Jean Corigliano
ADMINISTRATIVE LAW JUDGE